

***United States Court of Appeals
for the Second Circuit***



REPLY BRIEF

ORIGINAL

77-4171

**United States Court of Appeals
For the Second Circuit**

CAMILLO RIZZUTO,

Petitioner,

against

IMMIGRATION AND NATURALIZATION SERVICE,

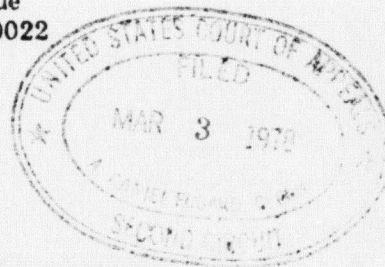
Respondent.

*Petition For Review of a Final Order of
The Board of Immigration Appeals*

PETITIONER'S REPLY BRIEF

FRIED, FRAGOMEN, DEL REY & O'ROURKE, P.C.
Attorneys for Petitioner
515 Madison Avenue
New York, N.Y. 10022

JOSEPH P. MARRO,
Of Counsel



Dick Bailey Printers, 290 Richmond Ave., Staten Island, N Y 10302
Tel. (212) 447-5358

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FOR THE SECOND CIRCUIT

Docket No. 77-4171

CAMILLO RIZZUTO,

Petitioner,

- against -

IMMIGRATION & NATURALIZATION
SERVICE,

Respondent.

PETITIONER'S REPLY BRIEF

Preliminary Statement

This Reply Brief is submitted pursuant to Rule 31(a) of the Federal Rules of Appellate Procedure. The purpose of this short Reply is solely to respond to certain arguments contained in the Respondent's Brief which was received by the Petitioner on February 23, 1978.

Statement of Facts

The pertinent facts in this case have been set forth with particularity in the Petitioner's Brief filed with this

Court on January 20, 1978, and reference is respectfully made thereto.

REPLY ARGUMENT

POINT I

The Record In This Case Demonstrates
That the Board Did Abuse Its Discretion

The Respondent's main contention is simply that in view of the adverse factors contained in the record, the Board's decision is correct (Respondent's Brief, p. 9). In so arguing, the Respondent appears to adopt the language of the Board that "the respondent's (Petitioner herein) equities are not sufficient to overcome the adverse factors that militate against the favorable exercise of discretion. (underscoring ours)" (A 2, 3)*. However, the record is totally devoid of adverse factors, except one, namely the conviction for a drug related offense.

In the Board's decision, the only explanation of adverse factors is contained in the second to last paragraph of the decision. There the Board refers to the Petitioner's recent convictions. However, here again the emphasis on

*References preceded by the letter "A" refer to pages in the Appendix filed in this Court.

convictions, plural, is misleading since although the Petitioner was convicted of the substantive crime and for the related conspiracy, it all emanated from one criminal scheme occurring on one day. (A3).

The Respondent's Brief, in a vain effort to elucidate the negative factors, sets forth what it believes to be the adverse reasons. The Respondent contends that at the time of the Petitioner's involvement in the conspiracy, he was unemployed, had no particular job skills and only a sixth grade education. (Respondent's Brief, p. 12). However, this ignores the undisputed testimony of record that because of the pending criminal case, the Petitioner found it obviously difficult to secure lasting employment (A 17) and that for the entire period of his residence in the United States until the indictment (1965-1971), he had always found work as a pressman and supported his family (A 15). With respect to the contention that the Petitioner had no particular job skill and only a sixth grade education, we submit that such reasons cannot form the basis to deny discretionary relief and that to rely upon them constitutes an error of law. In this regard we know of no decisions where discretionary relief was denied to an alien because of the fortuities of his birth. Indeed, it would be a sad day in American immigration when the right to remain here is predicated upon one's educational or financial credentials.

Finally, the assertion in the Respondent's Brief that the Petitioner was probably paid handsomely for his involvement (p. 12) is totally unwarranted, not supported by the record, and highlights the misconception that the Respondent labors under. The only material in the record in addition to the conviction itself, which casts any light on the criminal role of the Petitioner, is the statement of the prosecutor characterizing him as a minor figure. We submit that it is equally conceivable that the Petitioner was totally unaware of the nature or extent of the drug operation and that he merely was asked to do a favor without expectation of any compensation.

The Respondent has attempted to paint the Petitioner as a drug dealer who was involved in a very sophisticated and serious criminal activity (Respondent's Brief, p. 10). However, there is nothing in the record to support this assertion and such a portrayal of him is contrary to the evidence of record. Once the Petitioner established that his role was minor (A 28), this admission was binding on the Respondent and it was incumbent upon the Immigration Service to produce additional evidence to support its accusation.* Thus, in view of the

*We note that the Respondent's position is contradictory since the Government again admits "...Rizzuto was apparently only a minor figure in the operation..." (Respondent's Brief, p.11)

substantial equities in the Petitioner's favor, such as his long period of residence, family members, substantial roots in this country and the hardship to his citizen wife and children, the Board's decision should be overturned with instructions to grant the relief he requests.

POINT II

This Court Is Not Precluded From Reviewing
the Refusal to Admit Into Evidence The
Transcribed Admission On Behalf of the
Government

The Respondent asserts that the Petitioner is precluded from contesting the evidenciary ruling of the Immigration Judge to decline to accept into evidence the transcribed opening statement of the Government prosecutor because this argument was not formally presented to the Board. In support of this contention the Respondent relies upon Cisternas-Estay v. INS, 531 F. 2d 155, 160 (3rd. Cir. 1976). However, the Respondent's reliance upon this case is completely misplaced. In Cisternas-Estay, the alien argued that the immigration judge and the Board committed error since neither considered a change in the regulations pertaining to political asylum, which change occurred subsequent to the deportation hearing. Accordingly, the Court held that it did not have authority to consider a claim not submitted in the first instance to the administrative agency. See also: Chi Sheng Liu v. Holton, 297 F. 2d 740 (9th Cir. 1961).

Contrary to the factual situations presented in Cisternas-Estay v. INS, supra, and Chi Sheng Liu v. Holton, supra, the Petitioner herein did press his claim to the immigration judge at the administrative level seeking to have admitted into evidence the Government's opening statement in the criminal case. In the course of the on-the-record discussion between counsel for the Petitioner and the Immigration Judge, counsel was able to have the record contain the relevant portion of the transcript that he sought to introduce (A 28, 29). As a result, the Immigration Judge did allude to this fact in his opinion (A 6). However, the prejudice of not having the opening statement in evidence became manifest when the Board ignored the Petitioner's claim of being only a minor figure (R 13)* and denied the application for discretionary relief on the basis of the gravity of the offense. If the Board had before it the Government's admission that the Petitioner was merely a minor figure in the criminal scheme, we submit the Board could have, and should have, reached a contrary result.

In support of our contention that this Court has jurisdiction over this issue, we urge this Court to adopt the reasoning of the Tenth Circuit in Pilapil v. Immigration &

*References preceded by the letter "R" refer to the pages in the certified administrative record filed in this Court.

Naturalization Service, 424 F.2d 6 (10th Cir. 1970). There the alien raised several issues on appeal which had not been raised at the administrative level, either before the Immigration Judge or the Board. The Court determined however, that there is nothing in the jurisdictional statute [Section 106a of the Immigration and Nationality Act, 8 U.S.C. Section 1105(a)] that mandates that the precise issue be raised at the hearing in order to preserve the right of review. The Court continued that as long as the necessary facts are contained in the administrative record and where the issue is not frivolous, the Court can review it.

In the present case the Petitioner asserts that the administrative record does contain the pertinent facts for the Court to consider. Furthermore, since the prejudice to the Petitioner became paramount at the Board level by its failure to consider his role as only a minor figure, the Court should not be precluded from considering this issue.

With respect to the admissibility of the opening statement, the Respondent once again in its brief erroneously sets forth a proposition that the admissibility of documentary evidence at a deportation hearing is within the discretionary authority of the Immigration Judge. We strongly reject this novel concept that admissibility of evidence can be purely discretionary. Although 8 CFR Section 242.14 (set forth in full at page 6 of the Petitioner's Brief) uses the word "may"

in referring to the admissibility of oral or written statements, this merely implies that although such an offer of proof may lack the trustworthiness required at a judicial proceeding, it may be admitted in a deportation hearing. Moreover, this is borne out by the fact that the strict rules of evidence do not apply in a deportation hearing (e.g. hearsay would be admissible). However, this does not mean that an Immigration Judge has discretionary authority to exclude a perfectly admissible offer of proof. Accordingly, we submit that the opening statement of the prosecutor should have been admitted into evidence for the reasons contained in the Petitioner's Brief, and that the failure to admit it was prejudicial error.

CONCLUSION

The Petition for Review should be Granted and the Decision of the Board of Immigration Appeals set aside.

Respectfully submitted,

FRIED, FRAGOMEN, DEL REY & O'ROURKE, PC
Attorneys for the Petitioner
515 Madison Avenue
New York, N.Y. 10022

JOSEPH P. MARRO
Of Counsel

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

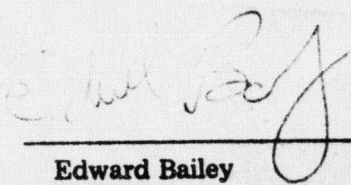
EDWARD BAILEY being duly sworn, deposes and says, that
deponent is not a party to the action, is over 18 years of age
and resides at 286 Richmond Avenue, Staten Island, N.Y.
10302. That on the 3 day of March ,19 78 at
No.

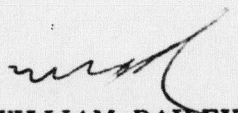
1 St. Andrews Pl., NYC

deponent served the within ~~XXXXXXXXXX~~ Brief
upon Thomas Belote, U.S. Attorney's Office

the Respondent herein, by delivering3 true
copy(ies) thereof to him personally. Deponent knew the person so
served to be the person mentioned and described in said papers as the
Respondent therein.

Sworn to before me this
3 day of March 1978.


Edward Bailey


WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

③

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Robert B. Fisk Jr.
UNITED STATES ATTORNEY

3/3/78

Marion F. Bryant

